

# **In Search of Origin of Recognition of Economic and Social Rights as Constitutional Principles: From Ireland to Bangladesh**

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Modern Constitutions generally have incorporated different types of human rights. They incorporated provisions regarding both civil and political rights and economic, social and cultural rights, though in a different way. However, the constitutions of different countries in the modern world contained, at first, essentially only civil and political (CP) human rights.<sup>1</sup> Subsequently, the idea was developed that unless economic human rights were ensured, CP rights guaranteed in the form of fundamental rights could not be properly enjoyed. Markandan says:

It was felt that the precious rights of personal liberty and political freedom might become a shame if not a mockery for those whom the existing social and economic order leaves starving, insecure in their livelihood, illiterate and deprived of their just share in the progress and well-being of the society as a whole. As a result, in the new constitutional arrangements made after World War I specific declaration of constitutional principles regarding social and economic policy were made.<sup>2</sup>

The Jacobin Constitution of 1793<sup>3</sup> recognized certain ESC rights for the first time, which incorporated provision regarding social assistance. Section 21 of this constitution said that the society had the duty to provide the persons who were unable to earn their livelihood for different reasons.<sup>4</sup> Subsequently, many other constitutions, like the Constitution of Denmark of 1849,<sup>5</sup> the Mexican Constitution of 1917,<sup>6</sup> the Constitution of the Russian Soviet Republic of 1918,<sup>7</sup> the Reich Constitution (German Weimar

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<sup>1</sup> Christian Tomuschat, *Human Rights Between Idealism and Realism* (Oxford University Press, 2<sup>nd</sup> ed, 2008) 26-27.

<sup>2</sup> K C Markandan, *Directive Principles in the Indian Constitution* (Allied Publishers, India, 1966) 9.

<sup>3</sup> French Constitution of 1793, which is also known as 'The Montagnard Constitution'.

<sup>4</sup> Erika De Wet, *The Constitutional Enforceability of Economic and Social Rights* (Butterworth, 1996) 5.

<sup>5</sup> Ida Elisabeth, 'The Protection of Socio-Economic Rights as Human Rights in Denmark' in Fons Coomans (ed), *Justiciability of Economic and Social Rights: experiences from Domestic Systems* (Intersentia, 2006) 17, 20-21.

<sup>6</sup> Henry J. Steiner et al., *International Human Rights in Context* (Oxford University Press, 3<sup>rd</sup> ed, 2008) 269.

<sup>7</sup> Section 17 of this constitution incorporated provision regarding state duty to provide free education.

Constitution) of 1919,<sup>8</sup> the Constitution of Finland of 1919<sup>9</sup> the Constitution of Liechtenstein of 1921,<sup>10</sup> the Constitution of the Spanish Republic of 1931,<sup>11</sup> the Constitution of Philippines of 1935,<sup>12</sup> incorporated different ESC rights which were justiciable.

The Reich Constitution of 1919 (Weimar Constitution) is distinctive as it incorporated, for the first time, a large number of provisions regarding economic, social and cultural rights in clear terms. The Reich Constitution enumerated the provisions regarding economic, social and cultural rights in its three different chapters, second, third and fourth. (Articles 119, 120, 142-165 of the Constitution). Of them, only a few provisions contain recognized 'rights', for example, article 119 says that '[l]arge families may claim social welfare' and article 120 says that '[i]t is the supreme obligation and natural right of the parents to raise their offspring to bodily, spiritual and social fitness; the governmental authority supervises it.' The provisions incorporated in those three chapters, generally speaking, impose duties on the state to take different necessary steps concerning those rights. The claim that such provisions have been made in clear terms is apparent from the drafting of the following articles of the Constitution of Reich--Article 119: Marriage, as the foundation of the family and the preservation and expansion of the nation, enjoys the special protection of the constitution. Article 142: The arts, science and instruction are free. State provides protection and participates in its cultivation. Article 143: The education of the youth has to be provided by public institutions. In their establishment, Reich, states and communities cooperate. Article 144: Schooling entirely is placed under state supervision; the state can give a share in that supervision to the communities. Article 146: ... .. Reich, states and communities have to provide funds to allow poor children access to middle and high schools, to grant financial aid to parents, whose children are regarded qualified for the education on middle and high schools, until their education is ended. Article 151: The economy has to be organized based on the principles of justice, with the goal of achieving life in dignity for everyone. Within these limits the economic liberty of the individual is to be secured. ... .. Legal force is permissible to realize threatened rights or in the service of superseding demands of public welfare. Article 153: Property is guaranteed by the constitution. Article 155: The distribution and usage of real estate is supervised by the state in order to prevent abuse and in order to strive to secure healthy housing to all German families, especially those with many children. Article 159: The right to form unions and to

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<sup>8</sup> The Reich Constitution of 1919 (Weimar Constitution) is distinctive and the reasons are mentioned in the next paragraph of this paper.

<sup>9</sup> Amos J. Peaslee, *Constitutions of Nations* (The Rumford Press, USA, 1950) vol 1, 777-90.

<sup>10</sup> Peaslee, above n 11, vol II, 376-93.

<sup>11</sup> Markandan, above n 2, 18-19.

<sup>12</sup> Peaslee, above n 11, Vol. II, pp. 793-809.

improve conditions at work as well as in the economy is guaranteed to every individual and to all occupations. All agreements and measures limiting or obstructing this right are illegal. Article 161: In order to maintain health and the ability to work, in order to protect motherhood and to prevent economic consequences of age, weakness and to protect against the vicissitudes of life the Reich establishes a comprehensive system of insurances, based on the critical contribution of the insured.

The Constitution of Finland recognized the right to property of citizens (Articles 6) and certain duties of the state regarding education (Articles 78-81). However, this Constitution did not contain any separate chapter to incorporate the economic and social rights. The right to property, an economic right, was incorporated in the same chapter, that is chapter II titled 'General Rights and Constitutional Protection of Finish Citizens' that contained civil and political rights. The duties regarding education were incorporated in a separate chapter titled 'Education', that is Chapter VIII.

The Constitution of Liechtenstein of 1921 contains the provisions regarding economic and social rights in a separate chapter, that is chapter III titled 'Of the Duties of the State', while chapter IV titled 'Of the Common Rights and Duties of the Citizens of the Country' contains civil and political rights. The constitutional arrangement of the rights of the citizens made in this Constitution of Liechtenstein of 1921 is significant in two respects: first, it included, for the first time, a separate chapter to incorporate the provisions regarding economic and social rights; and secondly, it recognized civil and political rights of the citizens as their rights, whereas the provisions regarding economic and social rights are recognized in the form of their corresponding duties on the state.

The Constitution of Philippines of 1935, while it used the term 'Principles', did not declare them to be judicially unenforceable, unlike the Constitution of Bangladesh. Article II titled 'Declaration of Principles', *inter alia*, states that 'the natural right and duty of parents in the rearing of the youth for civic efficiency should receive the aid and support of the government' (section 4), and declares that '[t]he promotion of social justice to insure the well-being and economic security of all the people should be the concern of the State' (section 5). The Constitution of the Spanish Republic of 1931 contained social and economic rights along with a set of cultural rights, in a separate chapter titled 'Family, Economic Conditions and Culture'

All of these constitutional provisions of different constitutions were made judicially enforceable. Thus, ESC rights started their inclusion in the Constitution as judicially enforceable provisions in the same way as other provisions of the Constitution.<sup>13</sup> This fact is perhaps remarkable, given the later dominance of the assumption that ESC rights are non-justiciable.

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<sup>13</sup> The author of this thesis has been unable after an extended search to cite any earliest case.

However, the Constitution of Ireland of 1937<sup>14</sup> made a significant change by introducing the novel idea of incorporating certain constitutional provisions that stood beyond the cognizance of the judiciary unlike other constitutional provisions. Article 45 titled 'Directive Principles of Social Policy', which departed from the 'rights' terminology,<sup>15</sup> incorporated certain obligations of the state regarding a few ESC rights in the form of judicially unenforceable directive principles of social policy.<sup>16</sup> Article 45 of the Constitution of Ireland of 1937 contained the following four sections:

1. The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life.
2. The State shall, in particular, direct its policy towards securing
  - (i) That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs.
  - (ii) That the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good.
  - (iii) That, especially, the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment.
  - (iv) That in what pertains to the control of credit the constant and predominant aim shall be the welfare of the people as a whole.
  - (v) That there may be established on the land in economic security as many families as in the circumstances shall be practicable.
3. (1) The State shall favour and, where necessary, supplement private initiative in industry and commerce.
  - (2) The State shall endeavour to secure that private enterprise shall be so conducted as to ensure reasonable efficiency in the production and distribution of goods and as to protect the public against unjust exploitation.
4. (1) The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged.

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<sup>14</sup> Peaslee, above n 11, vol II, 239-74. This Constitution came into force on 29 December, 1937.

<sup>15</sup> Tomuschat, above n 1, 27.

<sup>16</sup> Article 45 of the Constitution of Ireland of 1937. (Peaslee, above n 11, vol II, 261-62).

(2) The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength.

Thus, Article 45 of the Irish Constitution expressly declared that—

{ [t]he principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas.<sup>17</sup> The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.

The Constitution of Ireland by its article 45 added '[a]n interesting new accent'<sup>18</sup> which 'made a distinction between justiciable and non-justiciable and found a place for non-justiciable rights, so stated, in a constitutional document till then unknown.'<sup>19</sup> Thus, it appears that judicially unenforceable principles have been first introduced in the constitution of Ireland of 1937 in respect of ESC rights. However, the Irish Constitution recognized certain provisions regarding two social rights, namely, education (Art. 42) and family (Art. 41), in its judicially enforceable chapter on 'Fundamental Rights' that basically enumerated civil and political rights.<sup>20</sup>

The Irish Constitution of 1937 seems to have been the role model for the incorporation of judicially unenforceable principles in the constitutions of different countries of the world. The Constitution of India of 1950 contained such types of principles following the Irish model.<sup>21</sup> Part IV of the Constitution of India of 1950 titled 'Directive principles of State Policy' (DPSP) contains judicially unenforceable principles. The same trend of incorporation is also seen in the Pakistani constitutions of 1956 and 1962.

Bangladesh, after achieving its independence in 1971, followed that same constitutional trend of incorporation of principles of policy in the constitution. The Constitution of Bangladesh inserted economic, social and cultural rights as judicially unenforceable constitutional principles. Article 8(2) says:

The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable.

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<sup>17</sup> 'Oireachtas' is the name of the Irish Parliament.

<sup>18</sup> Tomuschat, above n 1, 27.

<sup>19</sup> Markandan, above n 2, 24.

<sup>20</sup> Peaslee, above n 11, vol II, 261-62.

<sup>21</sup> M. V. Pylee, *Constitutional Government in India* (Asia Publishing House, London, 1960) 306.

During the time of debate in the Assembly, Mr. Suranjit Sen Gupta, the only member of the opposition in the Constituent Assembly of Bangladesh, criticized inclusion of judicially unenforceable FPSP in the constitution and condemned it as an imitation of the Indian and Pakistani Constitutions.<sup>22</sup> The people of Bangladesh fought against Pakistan for their independence, so he particularly objected to the adoption of a Pakistani style in framing the Constitution of independent Bangladesh. The honourable speaker of the Constituent Assembly replied to that criticism saying that 'we used to eat before and still we eat. Everything cannot be changed. There are certain things which are common.'<sup>23</sup>

It is true that many constitutions incorporated provisions on economic, social and cultural rights before the Irish Constitution of 1937. It is an important finding of this article that economic and social rights were first protected by different constitutions as judicially enforceable principles just like civil and political rights. However, the Irish Constitution of 1937 had introduced the constitutional model of protection of economic, social and cultural rights as judicially unenforceable principles. Bangladesh has followed this Irish model in recognizing economic and social rights in its Constitution.

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<sup>22</sup> Bangladesh, *Constituent Assembly Debates (GonoParishader Bitarka, Sarkari Biboroni)*, Constituent Assembly, 1972, vol 2, 225.

<sup>23</sup> Ibid.